IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 11TH OCTOBER 2007 / 19TH ASWINA 1929

Crl.Rev.Pet.No. 4596 of 2006(E)

CRA.856/2005 of SESSIONS COURT, KOZHIKOE
ST.388/2005 of 2005 OF J.F.C.M. (MARAD CASES)KOZHIKODE

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REVN. PETITIONER: APPELLANT/ACCUSED.

MOOSAKOYA M., S/O.MOIDEEN,
ZARIN, PUTHIYANGADI P.O.,
CALICUT-673 021.

BY ADV. SRI.K.ANTONY JOSEPH
SRI.SAKIR.K.H.
SRI.S.VASUDEVAN

RESPONDENTS: RESPONDENT/COMPLAINANT & STATE.

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1. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

2. PARASMAL LUNAWAT, S/O.PADAMCHAND JAIN,
PROPRIETOR,DOLPHIN FINANCIAL SERVICES,EKP COMPLEX,
OPP.PAICO,KALLAI ROAD,CALICUT.REPRESENTED BY POWER
OF ATTORNEY HOLDER K.GIRISHAN,S/O.BHASKARAN,
GREENS,NEAR WATER TANK, P.O.PUTHIYARA,
CALICUT-4.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR
SRI.R.BINDU (SASTHAMANGALAM)
SRI.P.M.HARRIS

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 11/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V.RAMKUMAR, J.

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Crl.R.P. No. 4596 of 2006

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Dated: 11-10-2007

O R D E R

In this Revision filed under Section 397 read with Sec. 401 Cr.P.C. the petitioner who was the accused in S.T. No. 388 of 2005 on the file of the J.F.C.M. (Marad Cases), Kozhikode challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act').

2. I heard the learned counsel for the Revision Petitioner and the learned Public Prosecutor.

3. The learned counsel appearing for the Revision Petitioner re-iterated the contentions in support of the Revision. The courts below have concurrently held that the cheque in question was drawn by the petitioner in favour of the complainant on the drawee bank, that the cheque was validly presented to the bank, that it was dishonoured for reasons which fall under Section 138 of the Act, that the complainant made a demand for payment by a notice in time in accordance with clause (b) of the proviso to Section 138 of the Act and that the Revision Petitioner/accused failed to make the payment within 15 days of receipt of the statutory notice.

4. The learned counsel for the revision petitioner

submitted the following:-

The complainant is the power-of-attorney holder of Dolphin Financial Services which claims to be the recovery agent of M/s. Sreebaya Investments, Chennai. The specific case of the complainant is that the accused executed Ext.P4 cheque for Rs. 401050/- in favour of Dolphin Services towards his liability to Sreebaya Investment, Chennai. The specific defence taken by the revision petitioner was that he had no privily of contract at all with Dolphin Financial Services and that he had availed a loan of Rs. 2,00,000/- from Sreebhaya Investments , Chennai on 26-09-2001. At that time he had given a blank cheque to Sreebaya Investments who were misusing the cheque by handing it over to Dolphin financial Services. Admittedly, the authorisation from Sreebhaya to Dolphin is only on 11-09-2004 which is long after the availing of the loan by the accused from Sreebhaya. In the absence of any privily of contract between the accused and M/s. Dolphin Financial Services, the complainant could not have prosecuted the accused for an offence punishable under Sec. 138 of the Negotiable Instruments Act.

5. I am afraid that I cannot agree with the above submissions. Admittedly, the petitioner availed a loan of Rs. 2,00,000/- on 26-09-2001 from Sreebaya Investments, Chennai for buying a Tata 407 Mini bus. Even though the revision petitioner contended that he had discharged the loan in favour of of Sreebaya, no evidence in that behalf was adduced by him.

Even assuming that he had discharged the loan availed by him from Sreebaya, an explanation is due from him as to why he did not take the cheque back from Sreebaya. There is no dispute that Dolphin Financial Services is the recovery agent of Sreebaya. The revision petitioner's only contention is that Dolphine Financial Services got the authorisation in their favour long after the loan taken by the revision petitioner. That will not, in any way , affect the status of Dolphin Financial Services as the recovery agent of Sreebhaya Investments. No doubt, the amount covered by the cheque is 4,01,050/-. But taking into account the partial discharge proved by the accused the trial court had directed him to pay only the balance amount of Rs. 2,16,000/- by way of compensation besides sentencing him to simple imprisonment for six months. The lower appellate court reduced the said sentence to imprisonment till rising of court and sustained the direction for payment of Rs. 2,16,000/- as compensation. Both the courts have considered and rejected the defence set up by the revision petitioner while entering the above finding. The said finding has been recorded on an appreciation of the oral and documentary evidence. I do not find any error, illegality or impropriety in the finding so recorded concurrently by the courts below. The conviction was thus rightly entered against the petitioner.

6. What now survives for consideration is the question as to whether a proper sentence has been imposed on the Revision Petitioner. Having regard to the facts and circumstances of the

case, I am, however, inclined to modify the sentence imposed on the revision petitioner. Accordingly, if the revision petitioner pays to the first respondent complainant by way of compensation under Sec. 357 (3) Cr.P.C. a sum of **Rs. 2,16,000/- (Rupees two lakhs sixteen thousand only** within **five months** from today, then he need to undergo only imprisonment till the rising of the court. If the revision petitioner commits default in making the payment as aforesaid, he shall undergo simple imprisonment for three months by way of default sentence.

This Revision is disposed of confirming the conviction but modifying the sentence as above.

V. RAMKUMAR, JUDGE.

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